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## **NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

### **14 CFR Part 1251**

**[Document Number NASA-2015-0008]**

**RIN: 2700-AD85**

### **Discrimination on the Basis of Disability in Federally Assisted and Federally Conducted Programs and Activities**

**AGENCY:** National Aeronautics and Space Administration.

**ACTION:** Final rule.

**SUMMARY:** This rule revises the National Aeronautics and Space Administration (NASA) regulations implementing section 504 of the Rehabilitation Act of 1973 (section 504), which prohibits discrimination on the basis of disability in programs, services, and activities by recipients of Federal financial assistance from NASA as well as those programs, services, and activities conducted by NASA. The revisions to this rule are part of NASA's retrospective plan under Executive Order 13563 completed in August 2011. NASA's full plan can be accessed at: <http://www.nasa.gov/open/>.

**DATES:** *Effective:* [Insert 30 days after date of publication in the Federal Register].

**FOR FURTHER INFORMATION CONTACT:** Robert Cosgrove, Equal Opportunity Specialist, (202) 358-0446.

### **SUPPLEMENTARY INFORMATION**

#### **I. Background**

NASA implements the requirements of Section 504 of the Rehabilitation Act of 1973 (section 504), which prohibits discrimination on the basis of disability in federally conducted and federally assisted programs or activities, through its regulations in Part 1251.

On November 13, 2014 NASA published a Notice of Proposed Rulemaking (NPRM) in the Federal Register at 79 FR 67384 to amend its section 504 regulations to incorporate changes to the meaning and interpretation of the section 504 definition of disability required by the Americans with Disabilities Act Amendments Act of 2008 (ADA Amendments Act), include an affirmative statement of the longstanding requirement for reasonable accommodations in programs, services, and activities, and include a definition of direct threat and a provision describing the parameters of the existing direct threat defense to a claim of discrimination. The rule also proposed to clarify the existing obligation to provide auxiliary aids and services to qualified individuals with disabilities, update the methods of communication that recipients may use to inform program beneficiaries of their obligation to comply with section 504 to reflect changes in technology, adopt updated accessibility standards applicable to the design, construction, and alteration of buildings and facilities, establish time periods for compliance with these updated accessibility standards, and provide NASA with access to recipient data and records to determine compliance with section 504, and made administrative updates to correct titles.

NASA also proposed amending its section 504 regulations to incorporate changes required by the Rehabilitation Act Amendments of 1992 (1992 Amendments) by revising subpart 1251.2 –Employment Practices (federally assisted programs) and § 1251.540 – Employment (federally conducted programs) and instead referencing the U.S. Equal Employment Opportunity Commission’s (EEOC’s) Americans with Disabilities Act of 1990 (ADA) title I regulation.

NASA also proposed updating outdated terminology and references that currently exist in Part 1251 including changing the word “handicapped” and similar variations of that word that appear throughout part 1251, and replacing it with “people first” language (e.g., “individuals with disabilities”) consistent with the requirements of the 1992 Amendments.

## **II. Review of this rule by Department of Justice Pursuant to Executive Order 12250**

This final rule has been reviewed and approved by the U.S. Department of Justice (DOJ) in the exercise of its section 504 coordination authority under Executive Order 12250.

## **III. Discussion of Comments on the Proposed Rulemaking**

NASA received only one comment from a member of the public in response to its NPRM. This individual raised three concerns which are discussed below.

### **Issue 1:**

The commenter suggested that NASA simplify its language by replacing the phrase “nonhandicapped persons” wherever it is used in the regulations with the phrase “persons without a disability” rather than the phrase proposed by NASA, “persons who do not have a disability” NASA agrees and is making this change, except that instead of the phrase “persons without a disability,” NASA will use the phrase “individuals without disabilities.”

### **Issue 2:**

The commenter also objected to NASA’s inclusion of the activity of “speaking” in the list of major life activities in proposed § 1251.102(h)(2)(ii)(A). In the commenter’s view, because the list already provided “communicating” as an example, including “speaking” was redundant and unnecessary. NASA disagrees with the commenter. The ADA Amendments Act specifically references both “speaking” and “communicating” in its list of examples of major life activities. See 42 U.S.C. 12102(2)(A). NASA’s final rule no longer spells out a list of examples

of major life activities, however, because the rule now incorporates by reference the definition of disability contained in DOJ's ADA title II regulation at 29 CFR part 35.<sup>1</sup>

Issue 3:

The commenter also suggested that NASA revise the definition of disability in § 1251.102(h)(2)(iii)(A)(2) to narrow its application to fewer individuals with disabilities because in the commenter's view, it is too broad. NASA declines to adopt this recommendation as it proposes a change that is inconsistent with the changes to section 504 that were made by the ADA Amendments Act. Congress enacted the ADA Amendments Act to restore the understanding that the definition of disability shall be broadly construed and applied without extensive analysis, in response to the Supreme Court decisions in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), which interpreted the term "substantially limits" to require a greater degree of limitation than was intended by Congress. The ADA Amendments Act also amended the Rehabilitation Act of 1973 to conform the section 504 definition of disability at 29 U.S.C. 705(20)(B) to the ADA Amendments Act. NASA has decided, that in order to ensure, as Congress intended, that its section 504 definition of disability is interpreted consistently with the ADA Amendments Act, the final rule will incorporate by reference the definition of disability specified in the ADA title II regulation at 28 CFR part 35.

Since the publication of the NPRM, NASA has added definitions of "drug abuse" and "illegal use of drugs," and a provision specifically addressing the application of section 504 to

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<sup>1</sup> DOJ published its NPRM proposing to amend its title II and title III ADA regulations to incorporate the requirements of the ADA Amendments Act in the Federal Register on January 30, 2014. 79 FR 4839. This regulation incorporates the current version of the DOJ definition at 28 CFR part 35 and once DOJ publishes its final rule revising its definition of disability, this rule will apply to that revised definition.

persons who use illegal drugs. These provisions were added to conform the regulations to the express requirements of the Rehabilitation Act of 1973. *See* 29 U.S.C. 705(10) and (20)(C)(i-iii). NASA has also added a safe harbor provision to § 1251.301 to eliminate an inconsistency between the requirements for existing facilities in title II of the ADA and the corresponding requirements for section 504.

Finally, NASA has made a number of nonsubstantive clarifying edits and corrections to the regulatory text.

#### **IV. Overlap of coverage of NASA's section 504 federally assisted rule with coverage of the ADA.**

NASA's section 504 federally assisted regulation at § 1251.1 applies to recipients to whom the Agency extends Federal financial assistance, such as research, education, and training grants, and cooperative agreements, as well as programs, services, and activities conducted by NASA. NASA's section 504 federally assisted regulation at § 1251.103 prohibits denial of the benefits of, exclusion from participation in, or other discrimination against qualified individuals with disabilities in programs or activities because a recipient's facilities are inaccessible to or unusable by persons with disabilities. Many of the entities that receive financial assistance from NASA are also covered by Title II of the ADA (title II), which prohibits discrimination on the basis of disability by public entities (i.e., state and local governments and their agencies) or Title III of the ADA (title III), which prohibits discrimination on the basis of disability by: 1) public accommodations (i.e., private entities that own, operate, lease, or lease to places of public accommodation); 2) newly constructed and altered commercial facilities; and 3) private entities that offer certain examinations and courses related to educational and occupational certification.

Where possible and appropriate, NASA has tried to ensure consistency with its revised section 504 regulatory text to maintain consistency with the corresponding ADA requirements.

#### **V. ADA Amendments Act of 2008: Changes in the meaning and interpretation of the Section 504 definition of disability**

The ADA Amendments Act was signed into law in September 2008 and became effective on January 1, 2009. Congress enacted the ADA Amendments Act in order to ensure that the definition of disability is broadly construed and applied without extensive analysis, in response to Supreme Court decisions that had too narrowly interpreted the ADA's definition of a disability. The ADA Amendments Act not only amended the meaning and interpretation of the definition of disability applicable to the ADA, it also amended the Rehabilitation Act of 1973 to require similar changes to the meaning and interpretation of the definition of disability at 29 U.S.C. 705(20)(B) applicable to section 504. In the NPRM, NASA proposed to amend its section 504 regulations to include specific provisions implementing these revised requirements<sup>2</sup>. In the interest of uniform application of the definition of disability across both the ADA and section 504, NASA has decided that rather than spelling out the meaning and interpretation of the definition of disability in its own regulations, it is adopting the Department of Justice's current definition of disability at 28 CFR part 35, and once that definition is revised to reflect the requirements of the ADA Amendments Act, that revised definition will automatically apply to these regulations. Due to the changes that the ADA Amendments Act made to the application of the definition of disability, participants in recipients' programs, services, and activities who, in

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<sup>2</sup> DOJ, which has coordinating authority for Section 504 under Executive Order 12250, has reviewed and approved these proposed changes to NASA's Section 504 regulations.

the past decade, may not have been determined to have a disability under section 504 and title II may now be found to have a disability under those laws. Section 504 and the ADA define disability as (1) a physical or mental impairment that substantially limits a major life activity; (2) a record of such impairment; or (3) being regarded as having such an impairment (29 U.S.C. 705(9)(B); 42 U.S.C. 12102(1)). The ADA Amendments Act does not alter these three basic elements of the definition of disability in the ADA and section 504, but it significantly changes how the term "disability" is to be interpreted and adds important rules of construction to inform that interpretation. Specifically, Congress directed that the definition of disability shall be construed broadly and that the determination of whether an individual has a disability should not demand extensive analysis (42 U.S.C. 12102).

### **Definition of Auxiliary Aids and Services**

Although NASA's original section 504 federally assisted and federally conducted regulations referenced the provision of auxiliary aids,<sup>3</sup> they did not include a definition of the term. The final rule includes a definition for auxiliary aids and services which is consistent with the definition used in the ADA title II regulation at 28 CFR 35.104. The definition of auxiliary aids and services includes Video Remote Interpreting (VRI) as an example of an auxiliary aid or service. NASA notes that 28 CFR 35.160(d) and 36.303(f) of the ADA title II and title III regulations set forth specific performance standards for the use of VRI.

### **Employment**

NASA's rule also revises subpart 1251.2 – Employment Practices (federally assisted programs) and § 1251.540 – Employment (federally conducted programs) to conform to the 1992

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<sup>3</sup> Although the current regulation references "auxiliary aids," the term has always been understood to mean "auxiliary aids and services," and the revised regulation references them correctly.

Amendments (Pub. L. 102-569, sec. 506), which amended title V of the Rehabilitation Act to make the same employment standards set forth in title I of the ADA apply to employment discrimination under section 504. As such, the proposed rule deletes the existing requirements related to discriminatory employment practices and references the standards applied under Title I of the ADA (42 U.S.C. 12111 et seq.), the EEOC's ADA title I regulation at 29 CFR part 1630, as amended, and, to the extent such sections relate to employment, the provisions of sections 501 through 504 and 510 of the ADA (42 U.S.C. 12201-12204 and 12210).

In this final rule, NASA is clarifying its role in the processing and coordination of complaints alleging employment discrimination by its recipients. . Title I of the ADA (title I) prohibits discrimination against individuals with disabilities employed in a business that has fifteen or more employees. Title I is enforced by the EEOC, which is the designated Federal agency for the processing and adjudication of all complaints filed under title I. Many of the Agency's recipients may fall under both the jurisdiction of title I and section 504. NASA has authority to receive complaints of employment discrimination by recipients under section 504 and has developed procedures to identify when NASA has jurisdiction to process such complaints or when they must be referred to the EEOC or DOJ for processing. In order to avoid duplication of investigative and enforcement efforts, NASA will process and coordinate any complaints filed under this Part in accordance with the EEOC procedures set forth in 29 CFR part 1640 and DOJ procedures set forth at 28 CFR part 37 (Procedures for Coordinating the Investigation of Complaints or Charges of Employment Discrimination Based on Disability Subject to the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973).

In the final rule, NASA also clarifies its role in the processing and adjudication of section 504 complaints in its federally conducted programs.

## **Provision of Auxiliary Aids and Services**

NASA's original section 504 federally assisted regulation at § 1251.103(b)(3) provides that "[r]ecipients shall take appropriate steps to ensure that no handicapped individual is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination in any program or activity receiving Federal financial assistance because of the absence of auxiliary aids for individuals with impaired sensory, manual, or speaking skills."

The final rule clarifies this existing obligation to provide auxiliary aids and services by using affirmative language explaining this obligation. Similar language is already included in NASA's federally conducted regulation at § 1251.560 (Communications).

## **Notice of Recipient Obligations to Comply with Section 504**

NASA's existing section 504 regulation at § 1251.107(a) requires a recipient that employs 15 or more persons to take appropriate initial and continuing steps to notify participants, beneficiaries, applicants, and employees, including those with hearing and vision disabilities, and unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of disability in violation of section 504 and this part. The notification shall state, where appropriate, that the recipient does not discriminate in admission, access to, treatment, or employment in, its programs or activities. The notification shall also include an identification of the responsible employee designated to coordinate the recipient's efforts to comply with section 504 pursuant to § 1251.106(a). The regulation requires a recipient to make the initial notification required by this paragraph within 90 days of the effective date of this part. This regulation also delineates a choice of methods of initial and continuing notification "that may include the posting of notices, publication in newspapers and magazines, placement of notices in recipient's publication, and distribution of

memoranda or other written communications.” NASA recognizes that the methods by which a recipient communicates with interested persons have changed significantly since this regulation was promulgated and this regulation, as currently written, does not reflect the current and future state of information dissemination. With the advent of the broad application of the Internet and the World Wide Web, as well as electronic publishing, electronic mail (e-mail), text messaging, and social media platforms, NASA has determined that the regulation does not adequately include electronic methods of communication. Furthermore, NASA’s grant recipients currently rely on their Web sites, e-mail, text messaging, and social media to communicate with and provide information to the beneficiaries of their programs, services, and activities. Many of the publications that previously were available in print, such as pamphlets, brochures, maps, course catalogs, policies, and procedures, are now posted on recipients’ Web sites and can be printed or downloaded by an interested person viewing the Web site. In revising the regulation to include electronic communications, NASA is also providing its grant recipients the ability to provide this information in a more cost-effective and expeditious manner than by relying on printed media. Information or programs provided to the public on recipients’ Web sites should be provided in accessible formats in order to ensure equal access by individuals with communication disabilities to the recipients’ programs, services, and activities.

### **Accessibility Standards for New Construction and Alterations**

NASA's existing section 504 regulation at § 1251.302(c) requires that, if construction of a recipient's facility commenced after the effective date of the regulation (January 18, 1991), the facility must be designed and constructed so that it is readily accessible to and usable by persons with disabilities. This regulatory provision also requires that facility alterations commenced after January 18, 1991, that affect or may affect the facility's usability, must be accomplished so that,

to the maximum extent feasible, the altered portion of the facility is readily accessible and usable by persons with disabilities.

For facilities subject to the new construction and alterations requirements, the NASA regulation at § 1251.302(c) has always incorporated by reference an accessibility design standard, such that construction or alterations in conformance with that standard would be deemed in compliance with NASA's section 504 regulation. Under the original regulation, new construction or alterations made in conformance with the Uniform Federal Accessibility Standards (UFAS) are deemed to be in compliance with NASA's section 504 regulation, although a recipient may depart from UFAS when other methods provide equivalent or greater access to and usability of the facility.

The adoption of UFAS as an accessibility design standard in NASA's section 504 regulation occurred in 1991 as part of a joint rulemaking with other Federal agencies, led by DOJ pursuant to its coordinating authority for section 504 under Executive Order 12250. (51 FR 26862 July 28, 1986, as amended and 55 FR 52138, 52140, December 19, 1990). NASA and the other participating agencies adopted UFAS (effective January 18, 1991) to diminish the possibility that some recipients of Federal financial assistance would face conflicting enforcement standards either between section 504 and the Architectural Barriers Act of 1968, or among the section 504 regulations of different Federal agencies. (55 FR 52136-37 (1990)).

#### **Accessibility Standards in the ADA Regulations Issued by DOJ**

DOJ's 1991 title II ADA regulation incorporated by reference two sets of standards for new construction and alterations: UFAS and the 1991 ADA Standards for Accessible Design (1991 Standards), except that the elevator exemption contained at sections 4.1.3(5) and 4.1.6(1)(k) of the 1991 Standards did not apply. The 1991 title II ADA regulation also permitted

departures from the particular requirements of either standard by the use of other methods when it was clearly evident that equivalent access to the facility or part of the facility was thereby provided. UFAS was included as an option for title II entities because it was deemed the accessibility standard under existing section 504 accessibility regulations. However, UFAS was not an accessibility option under the ADA for title III entities, even if they were also subject to an agency section 504 regulation.

On September 15, 2010, DOJ published revised title II and title III ADA regulations that included the adoption of revised accessibility standards, the 2010 ADA Standards for Accessible Design (2010 Standards). (75 FR 56164). The 2010 Standards are based on the 2004 ADA Accessibility Guidelines, which were adopted by the U.S. Access Board in 2004 (36 CFR parts 1190 and 1191), but include additional scoping and technical requirements. The 2010 Standards, which now supersede the 1991 Standards, were adopted by DOJ through formal rulemaking and were subject to substantial scrutiny and deliberation, including consideration of costs and benefits. Compliance with the 2010 Standards is required for all new construction and alterations that commenced on or after March 15, 2012 for entities subject to both titles II and III of the ADA. (75 FR 56164, 56182 (Sept. 15, 2010)). As of March 15, 2012, UFAS was no longer an option for compliance with title II.

### **NASA's Revisions to its Section 504 Federally Assisted Regulation to Adopt the 2010 Standards**

In the preamble to the final title II regulation, DOJ stated that Federal agencies that extend Federal financial assistance should revise their section 504 regulations to adopt the 2010 Standards as section 504 standards for new construction and alterations (75 FR 56164, 56213

Sep. 15, 2010). DOJ also stated its intent to work with Federal agencies “to revise their section 504 regulations in the near future to adopt the 2010 Standards as the appropriate accessibility standard for their recipients.”

As proposed in the NPRM, in coordination with DOJ, NASA is adopting the 2010 Standards as set forth in 28 CFR part 35, in lieu of UFAS, for new construction and alterations commencing on or after one year from the publication date of the final rule in the Federal Register. In the time period between publication of this rule and the compliance date for the 2010 Standards, the rule provides that recipients may choose to comply with either UFAS or the 2010 Standards. For the reasons discussed below, the final rule specifies that all buildings and facilities newly constructed or altered by recipients in compliance with the 2010 Standards shall comply with the scoping and technical requirements for a “public building or facility” in the 2010 Standards, regardless of whether the recipient is a public entity or private entity.

Under NASA's current section 504 federally assisted regulation, the same title II accessibility standards for new construction and alterations are applied to all recipients regardless of whether they are public or private entities with an obligation to comply with title II or title III of the ADA, respectively. That is, both private and public recipients are subject to the same requirements for the purposes of compliance with NASA's section 504 federally assisted regulation. The 2010 Standards impose several different requirements for buildings and facilities covered by title II as compared to buildings and facilities covered by title III. For example, Exception 1 of section 206.2.3 of the 2010 Standards exempts certain multistory buildings owned by private entities from the requirement to provide an elevator. This exemption does not apply to buildings owned by public entities. Similarly, the 2010 Standards specify TTY requirements for public buildings that are different than those required for private buildings. In

order to maintain consistency in the requirements applicable to all its recipients, regardless of whether they are public or private entities, NASA is requiring all buildings and facilities covered by its section 504 federally assisted rule to comply with the scoping and technical requirements for a “public building or facility,” which are the requirements for buildings subject to title II of the ADA.

Compliance with the 2010 Standards is required one year from the publication date of the final rule in the Federal Register. In the period between the effective date of the final rule and the compliance date for new construction and alterations announced in the final rule, recipients shall be permitted to choose to use the 2010 Standards in lieu of UFAS.<sup>4</sup> However, regardless of which accessibility standard recipients choose to use during this time period, recipients must consistently rely on one accessibility standard and may not designate one accessibility standard for one part of a facility and the other for the remainder.

#### **Safe Harbor for Elements of an Existing Building or Facility in Compliance with UFAS**

Under § 1251.301(b) of NASA’s original section 504 federally assisted regulation, recipients that choose to make structural changes to their facilities in order to comply with the section 504 program accessibility requirements, must make those changes in compliance with the requirements of § 1251.302(c), which deems UFAS as the relevant accessibility standard. NASA’s revision of § 1251.302 to adopt the 2010 Standards, raises the question of whether recipients will have to update elements in UFAS-compliant buildings or facilities that are not otherwise being altered, in order to comply with the 2010 Standards. When DOJ revised its

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<sup>4</sup> This choice is in keeping with the DOJ March 2011 memorandum advising Federal agencies that until such time as they update their agency’s regulation implementing the federally assisted provisions of section 504 of the Rehabilitation Act of 1973 (section 504), they may notify covered entities that they may use the 2010 Standards as an acceptable alternative to the UFAS. ([www.ada.gov/504\\_memo\\_standards.htm](http://www.ada.gov/504_memo_standards.htm)).

title II ADA regulation to adopt the 2010 Standards, it included a “safe harbor” provision in the regulation that provided that elements in existing buildings that complied with the requirements in UFAS or the 1991 Standards did not have to be modified to comply with corresponding requirements in the 2010 Standards. In order to ensure consistency between the requirements for existing facilities in title II of the ADA and the corresponding program accessibility requirements in section 504, NASA has added a similar “safe harbor” provision in the final rule. This provision, which is directly modeled after the title II “safe harbor,” clarifies that for the purposes of complying with NASA’s program accessibility requirements for existing facilities, elements that have not been altered in existing buildings or facilities on or after the date that is one year after the date of publication of this Final Rule in the Federal Register and that comply with the technical and scoping specifications for those elements in UFAS, Appendix A to 41 CFR part 101–19.6 (1999 ed.), 49 FR 31528, app. A (Aug. 7, 1984), are not required to be brought into compliance with the requirements set forth in the 2010 Standards. Without this provision, recipients that are subject to titles II or III of the ADA and NASA’s section 504 rule would be held to different requirements; they would not be required by the ADA to modify already compliant elements based on UFAS (or the 1991 Standards) in existing facilities to comply with the 2010 Standards, but would be required to do so under NASA’s section 504 rule. The safe harbor provision incorporated into NASA’s final section 504 rule will avoid this anomalous result.

#### **Notice of Location of Accessible Facilities**

The current NASA section 504 regulation at § 1251.301(e) requires recipients to adopt and implement procedures to ensure that interested individuals, including individuals with vision or hearing disabilities, can obtain information as to the existence and location of

services, activities, and facilities that are accessible to and usable by individuals with disabilities. Since the publication of the NPRM, NASA has determined that the current NASA section 504 federally assisted regulation does not include a provision that is contained in the section 504 regulations of other Federal agencies that requires recipients to provide signs at a primary entrance to each of its inaccessible facilities directing users to an accessible facility or to a location at which they can obtain information about accessible facilities. This provision also requires that the international symbol for accessibility be used at each accessible entrance to a facility. NASA is adding this provision to § 1251.301(e) in order to conform to section 504 regulatory standards across the Government.

Triggering event: The rule also adopts the approaches used in both title II at 28 CFR 35.151(c) and title III at 28 CFR 36.406(a) to determine the “triggering event” for applying the standards to new construction and alterations under section 504. For NASA recipients that are public entities who would otherwise comply with title II (i.e., state and local governments and their agencies and organizations), the triggering event for application of the 2010 Standards under section 504 will be the commencement of physical construction or alterations. For private entities who would otherwise comply with title III (i.e., privately owned and operated organizations), the triggering event for the application of the 2010 Standards under section 504 is the date of: a) the last application for a building permit or permit extension certified to be complete by a state, county, or local government; b) in those jurisdictions where the government does not certify completion of applications, the date when the last application for a building permit or permit extension is received by the State, county, or local government; or c) if no permit is required, the start of physical construction or alterations. For both public and private entities, NASA has adopted the language found at 28 CFR 35.151(c)(4) in title II and 28 CFR

36.406(a)(4) in title III to make it clear that the date of ceremonial groundbreaking or the date a structure is razed to make it possible for construction of a facility to take place does not qualify as the commencement of physical construction.

### **Reasonable Accommodation (non-employment)**

In *Southeastern Community College v. Davis*, 442 U.S. 397, 99 S. Ct. 2361 (1979), the Supreme Court held that a person is not protected by section 504 if, in order to meet reasonable eligibility standards, the person needs program or policy modifications that would fundamentally alter the nature of the provider's program or impose undue financial and administrative burdens. In *Davis*, the Court upheld the community college's denial of admission to a nursing program applicant with a hearing disability who had requested that the college provide a supervisor to aid her in communicating with patients, to dispense with certain required courses, and to train her to hold some, but not all, positions available to registered nurses. Although the Court also opined in *Davis* that there may be situations where a refusal to modify an existing program might be discriminatory, the Court analyzed the case in terms of the proper interpretation of the statutory term "otherwise qualified." As a result, agency section 504 regulations<sup>5</sup> originally promulgated after *Davis* addressed the obligation to provide reasonable accommodations or reasonable modifications in the definition section for "qualified handicapped person," rather than in the nondiscrimination section.<sup>6</sup>

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<sup>5</sup> See, e.g., 14 CFR 1251.503 (NASA's section 504 federally conducted regulation.)

<sup>6</sup> With respect to any agency program or activity under which a person is required to perform services or to achieve a level of accomplishment, the regulatory definition of a "qualified handicapped person" (revised to "qualified individual with a disability" in this part) is an individual who meets the essential eligibility requirements of the program and who can achieve the purpose of the program or activity without modifications in the program or activity that the agency can demonstrate would result in a fundamental alteration in its nature.

Subsequently, in *Alexander v. Choate*, 469 U.S. 287, 105 S.Ct. 712 (1985), the Court clarified its *Davis* analysis. In *Alexander*, the Court described *Davis* as striking a balance between the need to provide qualified individuals with disabilities meaningful access to the benefit a grantee offers and the legitimate interests of Federal grantees in preserving the integrity of their programs. See 469 U.S. at 300-301. It further stated that, although its opinion in *Davis* “addressed that portion of section 504 that requires that a handicapped individual be ‘otherwise qualified’ before the nondiscrimination principle of section 504 becomes relevant, . . . the question of who is ‘otherwise qualified’ and what actions constitute ‘discrimination’ under the section would seem to be two sides of a single coin; the ultimate question is the extent to which a grantee is required to make reasonable modifications [accommodations] in its programs for the needs of the handicapped.” 469 U.S. at 300, note 19.

In keeping with these Supreme Court decisions, over the past decades Federal courts and Federal agencies have regularly acknowledged Federal agencies’ affirmative obligation to provide qualified individuals with disabilities reasonable accommodations in programs, services, and activities. However, their section 504 regulations have lacked a specific provision implementing this requirement.

When the ADA was enacted, Congress stated the obligation to make reasonable changes in policies, practices, or procedures when necessary to avoid discrimination on the basis of disability as a positive requirement. *See* U.S.C. 12182(b)(2)(A)(ii). DOJ incorporated this requirement into its ADA regulations at 28 CFR § 35.130(b)(7) and 28 CFR § 36.302. Accordingly, we have added provisions to the section 504 rules at §§ 1251.111 (federally assisted programs) and 1251.581 (federally conducted programs) stating that a recipient or the Agency, respectively, must provide reasonable accommodations when necessary to avoid

discrimination on the basis of disability, unless the recipient or the Agency can show that the accommodations would result in a fundamental alteration in the nature of its service, program, or activity or impose undue financial and administrative burdens.

NASA notes that title I of the ADA also uses the term “reasonable accommodation” to apply to changes in policies, practices and procedures with respect to employment, but the specific ADA title I regulatory requirements related to this term should not be applied to non-employment related requests for reasonable accommodations under section 504.

### **Qualified Individual with a Disability**

NASA has revised § 1251.102, which adds paragraph (n) defining “qualified individual with a disability.” The definition for “qualified individual with a disability” in this final rule is also revised in order to update the references to employment to cite to the EEOC’s ADA title I regulation and to streamline the language.

### **Direct Threat**

In *School Bd. of Nassau County, Fla. v. Arline*, 480 U.S. 273, 107 S.Ct. 1123 (1987), the Supreme Court directed that the determination of whether a person with a contagious disease is otherwise qualified must be made on an individualized basis, taking into account the: nature of the risk (how the disease is transmitted); duration of the risk (how long the carrier is infectious); severity of the risk (what the potential harm is to third parties), and; probability the disease will be transmitted and will cause varying degrees of harm. The individualized inquiry must include appropriate findings of fact about these factors, based on reasonable medical judgments given the state of medical knowledge. Based on these findings, a determination must be made as to

whether the individual’s disability could be reasonably accommodated.<sup>7</sup> Congress incorporated this concept into the ADA calling it a “direct threat.” The ADA regulations for titles II and III include specific provisions addressing determinations of “direct threat” in §§ 35.104 and 36.104 (definitions) and §§ 35.139 and 36.208. Accordingly, we revised our section 504 regulation to include comparable language addressing direct threat consistent with *Arline* and the ADA title II regulation. *See* §§ 1251.110 (federally assisted programs) and 1251.580 (federally conducted programs).

### **Compliance Procedures**

Federal agencies have the responsibility to ensure that their recipients comply with civil rights regulations that prohibit discrimination in programs, services, and activities that receive Federal financial assistance and generally have provisions in their regulations that provide the authority for agencies to ensure compliance and conduct enforcement activities. NASA’s original section 504 regulation at § 1251.400 incorporates by reference several provisions in NASA’s regulation implementing Title VI of the Civil Rights Act of 1964, at 14 CFR part 1250 that authorize NASA to conduct compliance activities to ensure that recipients do not discriminate on the basis of disability in their programs, services, and activities. These provisions require NASA to: conduct periodic compliance reviews of recipient programs; receive, investigate and resolve complaints of discrimination on the basis of disability alleged by recipient beneficiaries;<sup>8</sup> conduct hearings to determine whether Federal financial assistance is to

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<sup>7</sup> While *Arline* arose in the context of allegations that an individual with a “contagious disease,” may pose a danger to the health and safety of others, the individualized inquiry and the specific analysis required by *Arline* and this regulation apply to any allegations that a person with a disability poses a “direct threat” to the health or safety to others.

<sup>8</sup> 14 CFR 1250.106

be suspended, revoked, or withheld due to a recipient's failure to comply with any provisions of section 504;<sup>9</sup> and they provide for judicial review of NASA's actions to enforce section 504.<sup>10</sup> However, the original section 504 regulation did not incorporate by reference three additional title VI regulatory provisions that are included in other Federal agency section 504 regulations that pertain to procedures for compliance and are critical to effective enforcement of section 504. In contrast, NASA's civil rights regulations that prohibit discrimination on the basis of sex (Title IX of the Education Amendments of 1972)<sup>11</sup> and age (Age Discrimination Act of 1975),<sup>12</sup> as well as title VI, do have these provisions.

NASA has amended its section 504 federally assisted regulation at § 1251.400 to incorporate by reference those title VI regulatory provisions, originally omitted from the existing regulation. Accordingly, NASA incorporated by reference into § 1251.400, NASA's title VI regulation at § 1250.105 (Compliance information), which: requires NASA to seek the cooperation of recipients in obtaining compliance with this part; requires recipients and subrecipients to keep records and provide reports to NASA upon request to determine compliance with this part; requires recipients to permit NASA to have access to records and sources of information to determine compliance with this part; and requires recipients to make available information regarding provisions of this part and their applicability to the program for which the recipient receives Federal financial assistance in a manner deemed appropriate by NASA to apprise interested persons of the rights and protections afforded to them by this part.

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<sup>9</sup> 14 CFR 1250.108

<sup>10</sup> 14 CFR 1250.110

<sup>11</sup> 14 CFR 1253.605

<sup>12</sup> 14 CFR subpart 1252.2

NASA also incorporated by reference into § 1251.400, NASA's title VI regulation at § 1250.107 (Procedures for effecting compliance), which delineates the process by which NASA will effectuate compliance with this part through the termination, suspension, or refusal to grant or continue Federal financial assistance if a recipient's noncompliance with this part cannot be remedied through informal means. Lastly, NASA incorporated by reference into § 1251.400, NASA's title VI regulation at § 1250.109 (Decisions and notices) which delineates the process for rendering decisions and issuing findings in accordance with § 1250.107.

### **NASA's Revisions to its Section 504 Regulation for Federally Conducted Programs**

In addition to its revisions to its section 504 federally assisted regulation at part 1251, NASA also revised its section 504 regulation at § 1251.5 that prohibits discrimination on the basis of disability in programs, services, and activities conducted by NASA. In 1978, Congress extended application of section 504 to programs and activities conducted by Federal Executive agencies and the United States Postal Service. Pursuant to Executive Order 12250, the Department of Justice developed a prototype regulation to implement the 1978 amendment for federally conducted programs and activities. More than 80 Federal agencies, including NASA, issued regulations previously based on that prototype, prohibiting discrimination based on disability in the programs and activities they conduct. Despite the large number of regulations implementing section 504 for federally assisted and federally conducted programs and activities, there is very little variation in their substantive requirements, or even in their language. The regulatory revisions in this rulemaking impose similar requirements for NASA's federally conducted and NASA's federally assisted regulations, with the exception of the applicable

accessibility standards for new and altered facilities.<sup>13</sup>

Consistent with its revision to the definition of disability in § 1251.102( g), NASA has revised the definition of “disability” at § 1251.503(e) to incorporate by reference the definition of disability in the Department of Justice’s title II ADA regulation at 28 CFR part 35. NASA also revised the definition of “direct threat” and added definitions of “drug abuse” and “illegal use of drugs” to § 1251.503 to conform to the corresponding regulatory provisions in the federally assisted rule. NASA added a new provision incorporating statutory requirements addressing the application of section 504 to persons who use illegal drugs, and regulatory standards for direct threat, employment, and reasonable accommodation in the federally conducted programs regulation to conform with the companion regulatory standards in the federally assisted regulation for direct threat found at § 1251.110, reasonable accommodation found at §1251.111, illegal use of drugs found at § 1251.113, and employment found at § 1251.2. NASA also has conformed the language in § 1251.550(a), which addresses the limitations on the obligation to provide program accessibility in historic preservation programs conducted by the Agency, to the language used in the corresponding provision in the Department of Justice’s title II ADA regulation at 28 CFR 35.150 (a)(2), by removing the phrase “substantial impairment of historical features” of historical properties and replacing it with “threaten or destroy the historic significance” of these properties. NASA has also deleted the definition of “substantial impairment” at §1251.503 because the term is no longer used with respect to program

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<sup>13</sup> Facilities designed, built, or altered with Federal dollars or leased by Federal agencies are subject to the Architectural Barriers Act. The General Services Administration (GSA) is responsible for prescribing the accessibility standards for all of these facilities (other than residential structures and Department of Defense and U.S. Postal Service facilities). Thus, this rule references the updated ABA Accessibility Standards adopted by GSA in 2007. See 41 CFR part 102-76 subpart C.

accessibility in existing facilities and thus, the definition is no longer necessary. Last, NASA revised its regulation at § 1251.551 to update the reference to the GSA standards applicable to new construction, alterations and leases of Federal buildings subject to the Architectural Barriers Act, which is no longer found at the GSA Federal Management Regulation 41 CFR 101-19.600 to 101-19.607, but is now found at 41 CFR part 102-76, subpart C.

#### **IV. Regulatory analysis**

##### **Executive Order 12866 and Executive Order 13563**

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. This Final Rule has been designated a “significant regulatory action,” although not an economically significant one, under section 3(f) of Executive Order 12866. Accordingly, this rule has been reviewed by the Office of Management and Budget.

##### **Regulatory Flexibility Act**

NASA certifies that this rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities.

##### **Paperwork Reduction Act Statement**

This rule does not contain an information collection requirement subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.).

##### **Unfunded Mandates Reform Act of 1995**

Section 4(2) of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1503(2), excludes from coverage under that Act any proposed or final Federal regulation that “establishes or enforces any statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability.” Accordingly, NASA’s rulemaking is not subject to the provisions of the Unfunded Mandates Reform Act.

### **Small Business Regulatory Enforcement Fairness Act of 1996**

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996 (as amended), 5 U.S.C. 804. This rule will not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

### **List of Subjects in 14 CFR Part 1251**

Administrative practice and procedure, civil rights, equal employment opportunity, Federal buildings and facilities, and individuals with disabilities.

For the reasons stated in the preamble, the National Aeronautics and Space Administration amends 14 CFR part 1251 as follows:

### **PART 1251 - NONDISCRIMINATION ON BASIS OF DISABILITY**

1. The authority citation for part 1251 is revised to read as follows:

**Authority:** Sec. 504 (29 U.S.C. 794)

2. Revise the heading of part 1251 to read as set forth above.
3. In part 1251, wherever they appear, remove the words in the “Remove” column and add in their place the words in the “Add in its place” column in the following table:

<b>Remove</b>	<b>Add in its place</b>
handicap	disability
handicaps	disabilities
handicapped person	individual with a disability
handicapped persons	individuals with disabilities
handicapped individual	individual with a disability
handicapped individuals	individuals with disabilities
individuals with handicaps	individuals with disabilities
qualified handicapped individual	qualified individual with a disability
qualified handicapped individuals	qualified individuals with disabilities
qualified individuals with handicaps	qualified individuals with disabilities
qualified handicapped applicants or employees	qualified applicants or employees with disabilities
nonhandicapped persons	individuals without disabilities

### **Subpart 1251.1—General Provisions**

4. Revise §1251.100 to read as follows:

#### **§ 1251.100 Purpose and broad coverage.**

(a) Purpose. This part effectuates section 504 of the Rehabilitation Act of 1973, which is designed to eliminate discrimination on the basis of disability in any program or activity receiving Federal financial assistance.

(b) Broad scope of coverage. Consistent with the Americans with Disabilities Act Amendments Act of 2008's purpose (ADA Amendments Act) of reinstating a broad

scope of protection under the ADA and section 504, the definition of “disability” applicable to this part shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of this part. The primary object of attention in cases brought under this part should be whether entities covered under section 504 have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability. The question of whether an individual meets the definition of disability under this part should not demand extensive analysis.

5. Revise § 1251.102 to read as follows:

**§ 1251.102 Definitions**

As used in this part, the term:

- (a) 2004 ADAAG means the Americans with Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities requirements set forth in appendices B and D to 36 CFR part 1191 (2009).
- (b) 2010 Standards means the 2010 ADA Standards for Accessible Design, which consist of the 2004 ADAAG and the requirements contained in 28 CFR 35.151.
- (c) Applicant for assistance means one who submits an application, request, or plan required to be approved either by a NASA official or by a recipient, as a condition to becoming a recipient.
- (d) Associate Administrator means the Associate Administrator for Diversity and Equal Opportunity Programs for NASA.
- (e) Auxiliary aids and services means services or devices that enable persons with sensory, manual, or speech disabilities to have an equal opportunity to participate in, and enjoy the

benefits of, programs or activities conducted by the recipient. Auxiliary aids and services include:

(1) Qualified interpreters onsite or through video remote interpreting (VRI) services; notetakers; real-time computer-aided transcription services; written materials; exchange of written notes; telephone handset amplifiers; assistive listening devices; assistive listening systems; telephones compatible with hearing aids; closed caption decoders; open and closed captioning, including real-time captioning; voice, text, and video-based telecommunications products and systems, including text telephones (TTYs), videophones, and captioned telephones, or equally effective telecommunications devices; videotext displays; accessible electronic and information technology; or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing;

(2) Qualified readers; taped texts; audio recordings; Brailled materials and displays; screen reader software; magnification software; optical readers; secondary auditory programs (SAP); large print materials; accessible electronic and information technology; or other effective methods of making visually delivered materials available to individuals who are blind or have low vision;

(3) Acquisition or modification of equipment or devices; and

(4) Other similar services and actions.

(f) Direct threat means a significant risk to the health or safety of others that cannot be eliminated by a change to policies, practices or procedures, or by the provision of auxiliary aids or services as provided in § 1251.110 of this part.

(g) Disability means the definition given that term in the Department of Justice's regulation implementing title II of the ADA at 28 CFR part 35.

(h) Drug means a controlled substance as defined in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812).

(i) Facility means all or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or interest in such property.

(j) Federal financial assistance means any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the agency provides or otherwise makes available assistance in the form of:

(1) Funds;

(2) Services of Federal personnel; or

(3) Real and personal property or any interest in or use of such property, including:

(i) Transfers or leases of such property for less than fair market value or for reduced consideration; and

(ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.

(k) Illegal use of drugs means the use of one or more drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 U.S.C. 812). The term *illegal use of drugs* does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(l) Individual with a disability means any individual who has a disability as defined in 28 CFR part 35. The term “individual with a disability” does not include an individual who is currently engaging in the illegal use of drugs, when the recipient acts on the basis of such use.

(m) Program or activity means all of the operations of any entity described in paragraphs (m)(1) through (4) of this section, any part of which is extended Federal financial assistance:

(1)(i) A department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(ii) The entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(i) A college, university, or other postsecondary institution, or a public system of higher education; or

(ii) A local educational agency (as defined in 20 U.S.C. 7801), system of vocational education, or other school system;

(3)(i) An entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(A) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(B) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(ii) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) Any other entity which is established by two or more of the entities described in paragraph (m)(1), (2), or (3) of this section.

(n) Qualified individual with a disability means:

(1) With respect to any aid, benefit, or service, provided under a program or activity subject to this part, an individual with a disability who, with or without reasonable accommodations in rules policies, or procedures, the removal of architectural, communication, or transportation barriers, or the provision auxiliary aids or services, meets the essential eligibility requirements for participation in, or receipt from, that aid, benefit, or service, and

(2) With respect to employment, the definition given that term in the Equal Employment Opportunity Commission's regulation at 29 CFR part 1630, implementing Title I of the Americans with Disabilities Act of 1990, which regulation is made applicable to this part by § 1251.2.

(o) Recipient means any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.

(p) Section 504 means section 504 of the Act.

(q) The Act means the Rehabilitation Act of 1973, Pub. L. 93-112, as amended, 29 U.S.C. 794 et seq.

#### **§ 1251.104 [Amended]**

6. In § 1251.104, in paragraphs (a) and (c)(3), remove the word "Assistant" and add in its place the word "Associate".

#### **§ 1251.105 [Amended]**

7. In paragraphs (a)(1) through (3) and (c)(2) introductory text, remove the word "Assistant" wherever it appears and add in its place the word "Associate".

8. Amend § 1251.107 by revising paragraph (a) to read as follows:

**§ 1251.107 Notice.**

(a) A recipient that employs 15 or more persons shall take appropriate initial and continuing steps to notify participants, beneficiaries, applicants, and employees, including those with vision or hearing disabilities, and unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of disability in violation of section 504 and this part. The notification shall state, where appropriate, that the recipient does not discriminate in admission or access to, or treatment or employment in, its programs or activities. The notification shall also include an identification of the responsible employee designated pursuant to § 1251.106(a). A recipient shall make the initial notification required by this paragraph within 90 days of the effective date of this part. Methods of initial and continuing notification may include the posting of notices, transmission via electronic mail or text message, publication on the recipient's internet Web site, or in newspapers and magazines, placement of notices in recipient's publication, and distribution of memoranda or other written communications.

\* \* \* \* \*

**§ 1251.108 [Amended]**

9. Amend § 1251.108 by removing the word "Assistant" wherever it appears and adding in its place the word "Associate".

10. Add § 1251.110 to subpart 1251.1 to read as follows:

**§ 1251.110 Direct threat.**

(a) This part does not require a recipient to permit an individual to participate in or benefit from the services, programs, or activities of that recipient when that individual poses a direct threat to the health or safety of others.

(b) In determining whether an individual poses a direct threat to the health or safety of others, a recipient must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable accommodations in policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.

11. Add § 1251.111 to subpart 1251.1 to read as follows:

**§ 1251.111 Reasonable accommodation.**

A recipient shall make reasonable accommodations in policies, practices, or procedures when such accommodations are necessary to avoid discrimination on the basis of disability, unless the recipient can demonstrate that making the accommodations would fundamentally alter the nature of the service, program, or activity or result in an undue financial and administrative burden.

12. Add § 1251.112 to subpart 1251.1 to read as follows:

**§ 1251.112 Communications.**

(a) A recipient shall take appropriate steps to ensure that communications with applicants, participants, beneficiaries, members of the public, and companions with disabilities, are as effective as communications with others.

(b)(1) A recipient shall furnish appropriate auxiliary aids or services where necessary to afford qualified individuals with disabilities, including applicants, participants, beneficiaries, and

members of the public, an equal opportunity to participate in, and enjoy the benefits of, a program or activity of the recipient.

(i) In determining what type of auxiliary aid or service is necessary, the recipient shall give primary consideration to the requests of the individual with a disability.

(ii) The recipient need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Where the recipient communicates with applicants and beneficiaries by telephone, telecommunication devices for deaf persons (TTY's) or equally effective telecommunication systems shall be used to communicate with persons who are deaf or hard of hearing or have speech impairments.

(c) This section does not require the recipient to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where the recipient believes that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the recipient has the burden of proving that compliance with § 1251.112 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the chief executive officer of the recipient or his or her designee after considering all of the recipient's resources available for use in the funding and operation of the conducted program or activity and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this section would result in such an alteration or such burdens, the recipient shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the

maximum extent possible, individuals with disabilities receive the benefits and services of the program or activity.

13. Add § 1251.113 to subpart 1251.1 to read as follows:

**§ 1251.113 Illegal Use of Drugs**

(a) General. (1) Except as provided in paragraph (b) of this section, this part does not prohibit discrimination against an individual based on that individual's current illegal use of drugs.

(2) A recipient shall not discriminate on the basis of illegal use of drugs against an individual who is not engaging in current illegal use of drugs and who —

(i) Has successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully;

(ii) Is participating in a supervised rehabilitation program; or

(iii) Is erroneously regarded as engaging in such use.

(b) Health and drug rehabilitation services. (1) A recipient shall not deny health services, or services provided in connection with drug rehabilitation, to an individual on the basis of that individual's current illegal use of drugs, if the individual is otherwise entitled to such services.

(2) A drug rehabilitation or treatment program may deny participation to individuals who engage in illegal use of drugs while they are in the program.

(c) Drug testing. (1) This part does not prohibit a recipient from adopting or administering reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual who formerly engaged in the illegal use of drugs is not now engaging in current illegal use of drugs.

(2) Nothing in this paragraph (c) shall be construed to encourage, prohibit, restrict, or authorize the conduct of testing for the illegal use of drugs.

14. Revise § 1251.200 to read as follows:

**§ 1251.200 Discrimination prohibited.**

(a) General. No qualified individual shall, on the basis of disability, be subjected to discrimination in employment under any program or activity to which this part applies.

(b) Employment discrimination standards. The standards used to determine whether paragraph (a) of this section has been violated shall be the standards applied under Title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and, as such sections relate to employment, the provisions of sections 501 through 504 and 510 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as amended by the ADA Amendments Act of 2008 (Pub. L. 110-325), as such standards are implemented in the Equal Employment Opportunity Commission's regulation at 29 CFR part 1630. The procedures to be used to determine whether paragraph (a) of this section has been violated shall be the procedures set forth in § 1251.400 of this part.

**§ 1251.202 [Amended]**

15. Amend § 1251.202 by removing the word "Assistant" in paragraph (a)(2) and adding in its place the word "Associate".

16. Amend 1251.301 by redesignating paragraph (e) as paragraph (f) and revising it and adding a new paragraph (e) to read as follows:

**§ 1251.301 Existing facilities.**

\* \* \* \* \*

(e) Safe harbor. For the purposes of complying with this section, elements that have not been altered in existing facilities on or after [INSERT DATE ONE YEAR FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER] , and that comply with the corresponding

technical and scoping specifications for those elements in the Uniform Federal Accessibility Standards (UFAS), Appendix A to 41 CFR part 101–19.6, 49 FR 31528, app. A (Aug. 7, 1984), are not required to be modified to be brought into compliance with the requirements set forth in the 2010 Standards.

(f) Notice of location of accessible facilities—(1) General. The recipient shall adopt and implement procedures to ensure that interested individuals, including individuals with vision or hearing disabilities, can obtain information as to the existence and location of services, activities, and facilities that are accessible to and usable by individuals with disabilities.

(2) Signs at primary entrances. The recipient shall provide signs at a primary entrance to each of its inaccessible facilities, directing users to an accessible facility or a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each accessible entrance to a facility.

17. Amend § 1251.302 as follows:

- a. Revise paragraphs (a) and (c)(1); and
- b. Redesignate paragraphs (c)(2) and (3) as paragraphs (c)(5) and (6) and add new paragraphs (c)(2) and (3).

The revisions and additions read as follows:

**§ 1251.302 New construction and alterations.**

(a) Design and construction. Each facility or part of a facility constructed by, on behalf of, or for the use of a recipient shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by individuals with disabilities.

\* \* \* \* \*

(c) Accessibility standards and compliance dates—(1) Applicable accessibility standards. (i)

New construction and alterations undertaken prior to the compliance dates specified in paragraph

(c)(2) of this section must comply with either UFAS or the 2010 Standards.

(ii) New construction and alterations on or after the compliance dates specified in paragraph (c)(2) of this section must comply with the 2010 Standards.

(iii) New construction and alterations of buildings or facilities undertaken in compliance with the 2010 Standards shall comply with the requirements for a “public building or facility” as defined in the 2010 Standards regardless of whether the recipient is a public or private entity.

(iv) Departures from particular requirements of either standard by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided.

(2) Compliance dates—(i) New Construction and alterations by recipients that are private entities. (A) New construction and alterations in which the last application for a building permit or permit extension for such construction or alterations is certified to be complete by a state, county, or local government (or, in those jurisdictions where the government does not certify completion of applications, if the date when the last application for a building permit or permit extension is received by the state, county, or local government) is prior to [INSERT DATE ONE YEAR AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], or if no permit is required, if the start of physical construction or alterations occurs prior to [INSERT DATE ONE YEAR AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], then such new construction and alterations must comply with either the Uniform Federal Accessibility Standards or the 2010 Standards.

(B) New construction and alterations in which the last application for a building permit or permit extension for such construction or alterations is certified to be complete by a state, county, or local government (or, in those jurisdictions where the government does not certify completion of applications, if the date when the last application for a building permit or permit extension is received by the state, county, or local government) is on or after [INSERT DATE ONE YEAR AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], or if no permit is required, if the start of physical construction or alterations occurs on or after [INSERT DATE ONE YEAR AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], then such new construction and alterations shall comply with the 2010 Standards.

(ii) New construction and alterations by recipients that are public entities. (A) If physical construction or alterations commence prior to [INSERT DATE ONE YEAR AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], then such new construction and alterations must comply with either UFAS or the 2010 Standards.

(C) If physical construction or alterations commence on or after [INSERT DATE ONE YEAR AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], then such new construction and alterations shall comply with the 2010 Standards.

(3) For the purposes of this section, ceremonial groundbreaking or razing of structures prior to site preparation will not be considered to commence or start physical construction or alterations.

**Table of Applicable Standards for Complying With 14 CFR 1251.302(c)**

Compliance Dates for New Construction and Alterations	Applicable Standards for Complying With 14 CFR 1251.302(c)
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Prior to [INSERT DATE ONE YEAR AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].	UFAS or the scoping and technical requirements for a “public building or facility” in the 2010 Standards
On or after [INSERT DATE ONE YEAR AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].	Scoping and technical requirements for a “public building or facility” in the 2010 Standards.

\* \* \* \* \*

18. Section 1251.400 is revised to read as follows:

**§ 1251.400 Compliance Procedures.**

(a) The investigative, compliance, and enforcement procedural provisions of Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) are hereby adopted and apply to this section 504 regulation. These procedures are found at §§ 1250.105 through 1250.110 of this chapter.

(b) The Agency shall ensure that complaints alleging violations of section 504 with respect to employment are processed according to the procedures established by the EEOC in 29 CFR part 1640 and the United States DOJ at 28 CFR part 37.

**Subpart 1251.5—Enforcement of Nondiscrimination on the Basis of Disability in Programs or Activities Conducted by the National Aeronautics and Space Administration**

19. Section 1251.503 is revised to read as follows:

**§ 1251.503 Definitions.**

As used in this part, the term:

(a) Assistant Attorney General means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

(b) Auxiliary aids and services means services or devices that enable persons with sensory, manual, or speech disabilities to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the agency. Auxiliary aids and services include:

(1) Qualified interpreters onsite or through Video Remote Interpreting (VRI) services; notetakers; real-time computer-aided transcription services; written materials; exchange of written notes; telephone handset amplifiers; assistive listening devices; assistive listening systems; telephones compatible with hearing aids; closed caption decoders; open and closed captioning, including real-time captioning; voice, text, and video-based telecommunications products and systems, including text telephones (TTYs), videophones, and captioned telephones, or equally effective telecommunications devices; videotext displays; accessible electronic and information technology; or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing;

(2) Qualified readers; taped texts; audio recordings; Brailled materials and displays; screen reader software; magnification software; optical readers; secondary auditory programs (SAP); large print materials; accessible electronic and information technology; or other effective methods of making visually delivered materials available to individuals who are blind or have low vision;

(3) Acquisition or modification of equipment or devices; and

(4) Other similar services and actions.

(c) Complete complaint means a written statement that contains the complainant's name and address and describes the agency's alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of section 504. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

(d) Direct threat means a significant risk to the health or safety of others that cannot be eliminated by a change to policies, practices or procedures, or by the provision of auxiliary aids or services as provided in § 1251.110 of this part.

(e) Disability means the definition given that term in the Department of Justice's regulation implementing title II of the ADA at 28 CFR part 35.

(f) Drug means a controlled substance as defined in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812).

(g) Facility means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

(h) Historic preservation programs means programs conducted by the agency that have preservation of historic properties as a primary purpose.

(i) Historic properties means those properties that are listed or eligible for listing in the National Register of Historic Places or properties designated as historic under a statute of the appropriate state or local government body.

(j) Illegal use of drugs means the use of one or more drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 U.S.C. 812). The term "illegal use of drugs" does not include the use of a drug taken under supervision by a licensed health care

professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(k) Individual with a disability means any person who meets the definition of “disability” under 28 CFR part 35.

(l) Qualified individual with a disability means any person who meets the definition of “qualified individual with a disability” under § 1251.102 (i) of this part.

(m) Section 504 means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93-112, 87 Stat. 394 (29 U.S.C. 794)), as amended.

20. Revise § 1251.540 to read as follows:

**§ 1251.540 Employment.**

(a) General. No qualified individual shall, on the basis of disability, be subjected to discrimination in employment under any program or activity to which this part applies.

(b) Employment discrimination standards. The standards used to determine whether paragraph

(a) of this section has been violated shall be the standards applied under Title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12,111 et seq.) and, as such sections relate to employment, the provisions of sections 501 through 504 and 510 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as amended by the ADA Amendments Act of 2008 (Pub. L. 110-325), as such standards are implemented in the Equal Employment Opportunity Commission’s regulation at 29 CFR part 1630, as amended.

21. In § 1251.550, revise paragraph (a)(2) to read as follows:

**§ 1251.550 Program accessibility: Existing facilities.**

(a) \* \* \*

(2) In the case of historic preservation programs, require the Agency to take any action that would threaten or destroy the historic significance of historic properties.

\* \* \* \* \*

22. Revise § 1251.551 to read as follows:

**§ 1251.551 Program accessibility: New construction and alterations.**

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered so as to be readily accessible to and usable by individuals with disabilities. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151-4157), as established in 41 CFR part 102-76, subpart C, apply to buildings covered by this section.

23. In § 1251.570, revise paragraphs (b) and (c) to read as follows:

**§ 1251.570 Compliance procedures.**

\* \* \* \* \*

(b) The Agency shall process complaints alleging violations of section 504 of the Rehabilitation Act with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR part 1640 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) The Associate Administrator for Diversity and Equal Opportunity shall be responsible for coordinating implementation of this section. Complaints may be sent to the Office of Diversity and Equal Opportunity, NASA Headquarters, 300 E Street, S.W., Washington, DC 20546.

\* \* \* \* \*

24. Add § 1251.580 to subpart 1251.5 to read as follows:

**§ 1251.580 Direct threat.**

(a) This part does not require the Agency to permit an individual to participate in or benefit from the services, programs, or activities of that recipient when that individual poses a direct threat to the health or safety of others.

(b) In determining whether an individual poses a direct threat to the health or safety of others, the Agency must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable accommodations in policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.

25. Add § 1251.581 to subpart 1251.5 to read as follows:

**§ 1251.581 Reasonable accommodation.**

The Agency shall make reasonable accommodations in policies, practices, or procedures when such accommodations are necessary to avoid discrimination on the basis of disability, unless the Agency can demonstrate that making the accommodations would fundamentally alter the nature of the service, program, or activity or result in an undue financial and administrative burden.

26. Add § 1251.582 to subpart 1251.5 to read as follows:

**§ 1251.582 Illegal use of drugs**

(a) General. (1) Except as provided in paragraph (b) of this section, this part does not prohibit discrimination against an individual based on that individual's current illegal use of drugs.

(2) The Agency shall not discriminate on the basis of illegal use of drugs against an individual who is not engaging in current illegal use of drugs and who —

(i) Has successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully;

(ii) Is participating in a supervised rehabilitation program; or

(iii) Is erroneously regarded as engaging in such use.

(b) Health and drug rehabilitation services. (1) The Agency shall not deny health services, or services provided in connection with drug rehabilitation, to an individual on the basis of that individual's current illegal use of drugs, if the individual is otherwise entitled to such services.

(2) A drug rehabilitation or treatment program may deny participation to individuals who engage in illegal use of drugs while they are in the program.

(c) Drug testing. (1) This part does not prohibit the Agency from adopting or administering reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual who formerly engaged in the illegal use of drugs is not now engaging in current illegal use of drugs.

(2) Nothing in this paragraph (c) shall be construed to encourage, prohibit, restrict, or authorize the conducting of testing for the illegal use of drugs.

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NASA Federal Register Liaison Officer

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